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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ALLEN OTHMAN, Plaintiff and Respondent, v. ZIONS FIRST NATIONAL BANK et al., Defendants and Appellants.	B229825 (Los Angeles County Super. Ct. No. BC446297)

APPEAL from an order of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

Payne & Fears and Daniel M. Livingston for Defendants and Appellants.

Feldman & Associates, Inc., Mark A. Feldman and Craig C. Lang for Plaintiff and Respondent.

INTRODUCTION

Defendants Zions First National Bank (Zions) and Matthew Peterson (Peterson) appeal from an order denying their motion to compel arbitration. They challenge the trial court's determination that plaintiff Allen Othman (Othman) was not a party to the contract containing the arbitration provision and therefore was not bound by it. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Othman instituted this action against Zions and Peterson[1] on September 27, 2010, alleging causes of action for fraud, negligent misrepresentation and intentional interference with prospective economic advantage.[2] All causes of action stemmed from Othman's failed attempt to purchase commercial real property located at 1204 Foothill Boulevard in La Verne (the property) from its owners, Waleed and Melissa Saab (the Saabs).

Motion to Compel Arbitration

On November 2, 2010, defendants filed a motion to compel arbitration and for a stay of proceedings. In support of their motion, defendants presented the following evidence:

Zions was the holder of a note secured by a deed of trust originally recorded on the property on April 30, 2004. The note was assigned to Zions via a notice of assignment

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[1] Oakridge Management LLC, another named defendant, was later dismissed from the action.

[2] A fourth cause of action for conspiracy to interfere with prospective economic advantage was later dismissed at the request of Othman.

recorded on May 11, 2004. On March 26, 2010, Zions recorded a notice of default after the Saabs defaulted on their loan.

In July 2010, Peterson, a loan workout officer for Zions in Salt Lake City, Utah, had a telephone conversation with Othman, who was interested in purchasing the property or the note secured by the property. In order to obtain information about the underlying loan, it was necessary for Othman to execute a confidentiality agreement with Zions.

On July 22, 2010, Peterson emailed a "Confidentiality Agreement" (the agreement) to Othman. That evening, Arlene Bautista from the Administration Department of USS Cal Builders Inc. (USS) emailed the signed agreement back to Peterson. The first paragraph of the agreement stated it was entered into on July 21, 2010 and listed USS as the potential purchaser. On the signature page, above Othman's signature, Othman's name was printed under the heading "POTENTIAL PURCHASER." Below the signature "Buyer" was written in as Othman's "Title."

The agreement contained an arbitration provision. Under the heading "ARBITRATION DISCLOSURES," it stated, among other things, that "ARBITRATION WILL APPLY TO ALL DISPUTES BETWEEN THE PARTIES, NOT JUST THOSE CONCERNING THIS AGREEMENT."[3] In pertinent part it further provided: "Any claim or controversy ('Dispute') between or among the parties and their employees, agents, affiliates, and assigns, including, but not limited to, Disputes arising out of or relating to this agreement, this arbitration provision ('arbitration clause'), or any related agreements or instruments relating hereto or delivered in connection herewith ('Related Agreements'), and including, but not limited to, a Dispute based on or arising from an alleged tort, shall at the request of any party be resolved by binding arbitration in accordance with the applicable arbitration rules of the American Arbitration Association

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[3] The agreement only pertained to information regarding loans that Zions was willing to sell. This information was characterized as "Evaluation Material."

(the 'Administrator'). The provisions of this arbitration clause shall survive any termination, amendment, or expiration of this agreement or Related Agreements. The provisions of this arbitration clause shall supersede any prior arbitration agreement between or among the parties."

In addition, the arbitration provision established that "arbitration proceedings shall be conducted in a city mutually agreed by the parties. Absent such an agreement, arbitration will be conducted in Salt Lake City, Utah or such other places as may be determined by the Administrator. . . ."

The agreement provided that it was "binding upon Potential Purchaser and Authorized Representatives and their respective directors, officers, employees, agents, assigns, heirs and other successor-in-interest." In addition, it stated that "[t]he representative(s) signing this Agreement on behalf of Potential Purchaser represents that he or she is fully authorized to enter into this Agreement and to legally bind Potential Purchaser hereto."

On July 29, 2010, after receiving the signed agreement "and in reliance on [Othman's] signature as the 'Potential Purchaser,' Peterson sent Othman information regarding the loan. In August 2010, Peterson and Othman exchanged emails regarding the property, and Peterson also received information about Othman "personally" from his bank.

To Peterson's knowledge, Othman made no further efforts to buy the property or the underlying note. On August 24, 2010, the property was sold in a trustee's sale to Oakridge Management LLC.

Opposition to Motion to Compel

Othman opposed the motion to compel arbitration on the grounds that arbitration provision in the agreement was not enforceable against him, because the agreement was between Zions and USS. The opposition was supported by the declarations of Othman and Jennifer Hotrum (Hotrum), the president of USS.

Othman explained that although he is a vice president of USS, a general contractor, he instituted this action on his own behalf, not as a representative or employee of USS. In addition, he stated that he has never done business as USS in his individual capacity.

In July 2010, Othman consulted with Hotrum and other corporate officers about purchasing the property through a short sale. Hotrum and other officers were interested in exploring the possibility of purchasing the property as an investment for USS. Although Othman had found the property on his own and had considered buying it for himself, he decided to see first if USS was interested in acquiring the property for development. Othman thereafter contacted Peterson to discuss USS's purchase of the property and paying off the loan.

On July 22, 2010, Peterson presented Othman with the agreement. The first paragraph of the contract states that it is between USS and Zions. Othman signed the agreement in his capacity as an officer and representative of USS. A letter of reference from UBS Financial Services, Inc. (UBS Financial), which was attached to the agreement, confirmed its banking relationship with USS.

In the week following the execution of the agreement, Hotrum and other officers of USS advised Othman that they were no longer interested in purchasing the property for USS. Othman immediately informed Peterson that USS would not be purchasing the property and paying off the loan but stated that he was interested in doing so in his individual capacity. Neither Peterson nor anyone else affiliated with Zions objected.

The escrow instructions for the purchase of the property named Othman, not USS. At no time did Peterson advise Othman that he needed to execute a separate confidentiality agreement in his individual capacity. And, USS did not assign any right or responsibility under the agreement to Othman.

Othman was prepared to purchase the property in a short sale involving the co-owners. Throughout the process, Peterson told Othman that Zions was willing to facilitate the short sale and to accept a discounted pay-off of the loan. In reliance on

Peterson's representations, Othman hired an architect to draft plans to develop the property.

Othman subsequently learned that Zions proceeded with a foreclosure sale of the property on August 25, 2010, before Othman's escrow closed. Othman instituted this action as a result.

Hotrum confirmed that Othman was one of many USS vice presidents. Neither Othman nor any other person was authorized to do business as USS.

Hotrum further confirmed that, in July 2010, she authorized Othman to execute on behalf of USS a confidentiality agreement drafted by Zions, in that USS initially was interested in purchasing and developing the property. Hotrum understood that defendants were attempting to enforce the agreement through their motion to compel arbitration.

Soon after the agreement was executed, Hotrum and several officers of USS decided that USS was no longer interested in buying the property. Hotrum instructed Othman to notify Zions of this development. At this point, Othman no longer had the authority to act on behalf of USS in relation to the property. Neither Hotrum nor anyone else at USS assigned any right or responsibility under the agreement to Othman in his individual capacity.

Reply to Opposition to Motion to Compel Arbitration

In reply to Othman's opposition, defendants presented the following additional evidence:

Prior to July 2, 2010, Daniel P. Ellison (Ellison) was a loan workout officer for Zions. In December 2009, Ellison's responsibilities included the property then owned by the Saabs.

On or about February 16, 2010, Ellison received a fax from a real estate agent. The fax included a buyer representation agreement for Othman personally, a copy of a deposit check from Othman personally, a buyer's intent to exchange supplement from Othman personally, and a commercial property purchase agreement for the property by

Othman as "an individual." On or about March 16, 2010, Ellison received another commercial property purchase agreement.

At the end of June 2010, Ellison's work assignment changed, and the file pertaining to the property was transferred to Peterson. At no time during the six months that Ellison was responsible for the file on the property did Othman indicate that he was interested in acquiring the property for USS or anyone other than himself personally, although Othman did email Ellison using a USS email address. Ellison did not recall seeing any documents listing any entity or person other than Othman personally as the prospective buyer of the property.

Ellison explained that as a condition to any short sale, the liens junior to Zions's had to be released. The refusal of the junior lien holders to release their interests in the property was one reason the property ultimately was not sold to Othman.

With regard to the reference letter from UBS Financial, Peterson declared that, although he received the letter, he did not request it. Peterson added, "I assumed the letter was sent to me because Mr. Othman was the owner of USS Cal Builders and he had asked the bank to provide Zions with the credit reference as further evidence of Mr. Othman's financial wherewithal to purchase the Property. The UBS letter was not requested by me. The UBS letter was received at a different time, and was completely unrelated to, the Confidentiality Agreement."

Trial Court's Ruling

At the hearing on Zions and Peterson's motion to compel arbitration, the court noted that this "was a close case" and that it had been inclined to grant the motion until it read the first paragraph of the agreement, which stated the contract is between USS and Zions. The trial court entertained the arguments of counsel after which it denied the motion.

This appeal followed.

DISCUSSION

Code of Civil Procedure section 1281.2 in pertinent part provides: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists . . . ." On appeal from an order denying a motion to compel arbitration, we review the factual determinations of the trial court under the substantial evidence standard, but we review the legal issues independently. (*Duick v. Toyota Motor Sales, U.S.A., Inc.* (2011) 198 Cal.App.4th 1316, 1320.) We thus must "accept the trial court's resolution of disputed facts when supported by substantial evidence; presume the court found every fact and drew every permissible inference necessary to support its order; and defer to its determinations regarding the credibility of witnesses and the weight of the evidence." (*Provencio v. WMA Securities, Inc.* (2005) 125 Cal.App.4th 1028, 1031.)

Under federal and state law, arbitration cannot be compelled unless there is an agreement to arbitrate. (*Adajar v. RWR Homes, Inc.* (2008) 160 Cal.App.4th 563, 569.) "As the United States Supreme Court has stated, 'The "liberal federal policy favoring arbitration agreements," [citation] . . . is at bottom a policy guaranteeing the enforcement of private contractual arrangements.' [Citations.] Similarly, the California Supreme Court has stated that, '"[T]he policy favoring arbitration cannot displace the necessity for a voluntary *agreement* to arbitrate."' [Citation.] 'Although "[t]he law favors contracts for arbitration of disputes between parties" [citation], "'there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate. . . .'" [Citations.]' [Citations.]" (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 788; accord, *Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 481-482.)

The trial court determined that Othman could not be compelled to arbitrate his personal claims against the defendants because he only signed the agreement in his representative capacity as vice-president of USS and thus was not personally bound by the arbitration provision. As previously noted, the first paragraph of the agreement states in no uncertain terms that it was entered into on July 21, 2010, between Zions and USS as the "'Potential Purchaser.'" USS, being a corporation, could only act through its employees or agents. (*Kight v. CashCall, Inc.* (2011) 200 Cal.App.4th 1377, 1392.) The trial court so determined and thus construed Othman's signature to have been made solely on behalf of the corporation, despite Othman's characterization of himself on the signature page as the potential purchaser and buyer. This determination is supported by substantial evidence, namely, Othman's statement in his declaration that he signed on behalf of USS. We have no basis upon which to disturb the trial court's factual determination. (*Provencio v. WMA Securities, Inc., supra,* 125 Cal.App.4th at p. 1031.)

With regard to the trial court's legal determination that Othman was not bound by the arbitration provision in his personal capacity, we conclude this determination was correct. *Benasra v. Marciano* (2001) 92 Cal.App.4th 987 is instructive. In 1992 and 1994, Guess?, Inc. (Guess) entered into two licensing agreements with Pour le bebe, Inc. and Pour La Maison, Inc. (collectively PLB), each containing an arbitration provision. Michel Benasra (Benasra) signed both agreements in his capacity as president of PLB. (*Id*. at p. 989.)

A number of years later, Guess terminated the licensing agreements and demanded arbitration to resolve its disputes with PLB. Guess's president, Paul Marciano, subsequently wrote to Benasra and an investment banking firm working with PLB, accusing them of fraud, embezzlement, criminal conduct and greed. (*Benasra v. Marciano, supra,* 92 Cal.App.4th at p. 989.)

Benasra thereafter sued Marciano and Guess for libel. Believing that Benasra's libel claim related to related business disputes between Guess and PLB, Guess moved to compel arbitration. Benasra opposed the motion on two grounds: (1) he was not a party

to the licensing agreements and (2) the arbitration provisions did not apply to claims for libel. (*Benasra v. Marciano*, *supra*, 92 Cal.App.4th at pp. 989-990.)

The trial court denied the motion, agreeing with Benasra. On appeal, our colleagues in Division One concluded that Benasra was not bound by the arbitration provisions in the licensing agreements and thus did not need to reach the issue of whether Benasra's libel claim related to or arose out of those agreements. (*Benasra v. Marciano*, *supra*, 92 Cal.App.4th at p. 990.)

Although the *Benasra* court acknowledged "[t]he strong public policy in favor of arbitration," it aptly observed that such policy "does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration." (*Benasra v. Marciano*, *supra*, 92 Cal.App.4th at p. 990; accord, *AT&T Technologies v. Communications Workers* (1986) 475 U.S. 643, 648 [106 S.Ct. 1415, 89 L.Ed.2d 648].) Because Benasra signed the licensing agreements solely in his representative capacity as president of PLB, the court concluded that Benasra was not a party to the licensing agreements. (*Benasra*, *supra*, at p. 990.) Guess's attempts to avoid this consequence by advancing the argument that Benasra was an agent of PLB and an intended third-party beneficiary of the licensing agreements were unsuccessful. (*Id*. at pp. 990-993.) The court therefore affirmed the order denying the motion to compel arbitration. (*Id*. at p. 993.)

Guided by *Benasra*, we hold that Othman, having signed the agreement in his representative capacity as a vice president of USS, is not bound by the arbitration provision in his personal capacity. (Cf. *McCarthy v. Azure* (1st Cir. 1994) 22 F.3d 351 [a corporate officer who executes an agreement containing an arbitration clause in his corporate capacity may not be compelled to arbitrate claims brought against him in his individual capacity]; *Flink v. Carlson* (8th Cir. 1988) 856 F.2d 44, 46 [an agent who signs an arbitration agreement as an agent for a disclosed principal is not bound to arbitrate claims against him personally].) That the agreement expressly covers "any claim or controversy between or among the parties and their employees, agents, affiliates,

and assigns" does not compel a contrary result. Othman did not sue in any of these capacities. Defendants' reliance on cases in which non-signatories to an arbitration agreement were covered by the agreement are factually inapposite and do not support the proposition advanced by defendants that a signatory who executes a contract containing an arbitration provision solely in a representative capacity is bound by that provision in his individual capacity.[4]

Next, defendants contend that Othman is bound by the terms of the agreement because he personally received the benefits conferred by the agreement. We are not convinced. The evidence in this case demonstrates that Othman had extended dealings with Zions, through its agents Ellison and Peterson, regarding buying the note on the property or buying the property itself. During a very small window of time in July 2010, however, USS entered the picture. By this time, Ellison no longer was handling the file on the property. Peterson was. It was during this brief time period that Othman advised Peterson of USS's interest in the property, Zions provided Othman with the agreement, Othman executed it on behalf of USS, and Zions disclosed the confidential evaluation material to USS's agent Othman. That USS thereafter decided that it was no longer interested in acquiring the property does not change the fact that Othman received the evaluation material after executing the agreement as an agent of USS, not in his personal capacity.

Defendants further contend that Othman is judicially estopped from claiming he is not bound by the agreement. "'Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process.'" (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.)

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[4] See *Michaelis v. Schori* (1993) 20 Cal.App.4th 133; *Keller Construction Co. v. Kashani* (1990) 220 Cal.App.3d 222; *Izzi v. Mesquite Country Club* (1986) 186 Cal.App.3d 1309; and *Hawkins v. Superior Court* (1979) 89 Cal.App.3d 413, 415.

In his complaint, Othman alleged that "[o]n July 22, 2010, while the Property was in escrow, pending the sale between Plaintiff and the Saabs, Plaintiff spoke telephonically with MATT PETERSON, who was at Zions' office in Salt Lake City, Utah, regarding Zions' approval of the sale of the Property to Plaintiff. During that conversation Mr. Peterson, acting on his own behalf and on behalf of Zions, represented to Plaintiff that Zions would cooperate in facilitating the sale of the Property to Plaintiff and would not impede Plaintiff's attempts to purchase the Property." Defendants maintain that "[i]t is disingenuous to claim that at the exact moment [Othman] personally became a victim of an alleged tort for purposes of this lawsuit, he was simultaneously a mere 'agent' of USS Cal Builders for purposes of the Agreement." Defendants continue: "Nowhere in the Complaint is there any mention of USS Cal Builders having any interest in the Property whatsoever. Every single allegation concerns Mr. Othman's personal alleged rights and interest in the Property. He is estopped to make such allegations but to deny his personal obligations arising from the same transaction."

In response, on page 4 of his respondent's brief, Othman states: "The representations by [defendants] that Zions would facilitate the sale of the Property to Mr. Othman were made throughout the entire process. [Citation.] In his complaint, in describing the fraud cause of action, Mr. Othman points specifically to a fraudulent representation made on July 22, 2010, which also happens to be the same date that USS Cal executed the confidentiality agreement at issue. [Citation.] However, there were several representations by Mr. Peterson and other representatives of Zions that Zions would take the necessary action to facilitate the purchase of the property, either by Mr. Othman or USS Cal. While USS Cal [*sic*] did not feel it was necessary to include all such representations in the initial pleadings phase of the case, it [*sic*] can and will provide such evidence at the trial on the merits." (Fn. omitted.)

While it is true, as defendants argue, that the complaint is devoid of any allegation that USS had any interest in the property, this is wholly consistent with Othman's averment that he instituted this action on his own behalf, not as a representative or

employee of USS. As for the quandary posed by Othman's allegation pertaining to the events of July 22, 2010, that is a factual issue to be resolved at trial. Defendants are free to allege the defense of judicial estoppel in their answer. The doctrine does not, however, serve as a basis for reversing the factual and legal determinations made by the trial court when ruling on the motion to compel arbitration.[5]

DISPOSITION

The order is affirmed. Othman is to recover costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.

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[5] In light of our conclusion, we need not reach the merits of defendants' contentions that Othman's fraud claims and his claims against Peterson are covered by the mandatory arbitration provision.